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Deborah S. Nall

UNITED STATES V. BOOKER: THE PRESUMPTION OF PREJUDICE IN PLAIN ERROR REVIEW

DEBORAH S. NALL*

INTRODUCTION

United States v. Booker[1] created a sea change in the law by rendering the federal sentencing guidelines ("Guidelines") advisory rather than mandatory.[2] Criminal defendants sentenced prior to the decision—under what were then perceived as mandatory sentencing formulae—may therefore raise the issue of *Booker* error[3] on appeal as long as they had appeals pending when the decision was issued.[4] Such appeals will be reviewed for "plain error," the traditional standard for issues that were neither raised at trial nor expressly waived.

Plain error review occurs when a defendant did not raise an issue at trial, but the federal court of appeals determines there is (1) error;[5] (2) that

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1. 125 S. Ct. 738 (2005).

2. *See id.* at 756; *see also* United States v. Gonzalez-Huerta, 403 F.3d 727, 750 (10th Cir. 2005) (en banc) (Briscoe, J., concurring in part and dissenting in part).

3. The sentencing judge may have committed either a constitutional error, by enhancing the defendant's sentence pursuant to facts found by the judge, or a non-constitutional (statutory or procedural) error, by sentencing a defendant under guidelines presumed to be mandatory rather than advisory. *See Gonzalez-Huerta*, 403 F.3d at 731. All twelve circuits agree that constitutional and statutory error both individually constitute error that is plain for the purpose of plain error review. *See, e.g., id.* at 732.

4. All of the federal appellate courts to consider the issue have determined that the Court's decision in *Booker* is not retroactive. *See* United States v. Gentry, No. 04-11221, 2005 WL 3317891, at *6 (5th Cir. Dec. 8, 2005) ("[W]e join the several courts of appeals that have held that *Booker* does not apply retroactively.").

5. The Supreme Court of the United States has determined that "[d]eviation from a legal rule is 'error' unless the rule has been waived." United States v. Olano, 507 U.S. 725, 732–33 (1993).

is plain;[6] (3) that "affects substantial rights;" and (4) that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."[7] Although it is clear that federal appellate courts are to use the plain error standard when *Booker* error is raised for the first time on direct appeal,[8] the Supreme Court of the United States offers no guidance in *Booker* for the proper interpretation of the third plain error prong, when the error prejudices a defendant's substantial rights. This omission has created an intercircuit split over the correct application of the substantial rights prong of plain error review in cases involving *Booker* error.[9]

In an unusual two-part opinion, the Court held in *Booker* that the provision that renders the Guidelines mandatory for federal judges is unconstitutional because it violates the Sixth Amendment.[10] Striking the mandatory provision, the Court reaffirmed its prior holding in *Apprendi v. New Jersey*[11] that the Sixth Amendment requires any fact other than a prior conviction that is necessary to support a more lengthy sentence than that authorized by the facts established by a guilty plea or a jury verdict to be "admitted by the defendant or proved to a jury beyond a reasonable

6. "[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration." Johnson v. United States, 520 U.S. 461, 468 (1997).

7. *Id.* at 466–67 (quoting Carlisle v. United States, 517 U.S. 416, 425–26 (1996)).

8. Because it would have been impossible for defendants to raise the issue at trial, all twelve federal appellate courts agree that plain error analysis is appropriate. *See* United States v. Booker, 125 S. Ct. 738, 769 (2005). If the court of appeals determines that the plain error affected the defendant's substantial rights to a degree that the outcome of the trial was affected, the court may either reverse or vacate the sentence. Thomas M. Hoskinson, Note, *Criminal Procedure: Trial Integrity and the Defendant's Rights Under the Plain Error Rule 52(b)*, 37 SUFFOLK U. L. REV. 1129, 1131–32 (2004).

9. All circuits except the Tenth have determined that a defendant who is able to demonstrate prejudice under the third prong will therefore be able to demonstrate that the error seriously impaired the fairness, integrity, or public reputation of the judicial proceeding as required by the plain error test. *See* United States v. Heldeman, 402 F.3d 220, 223–24 (1st Cir. 2005); United States v. Crosby, 397 F.3d 103, 118 (2d Cir. 2005); United States v. Davis, 407 F.3d 162, 166 (3d Cir. 2005); United States v. Hughes, 401 F.3d 540, 555 (4th Cir. 2005); United States v. Garza-Lopez, 410 F.3d 268, 275 (5th Cir. 2005); United States v. Barnett, 398 F.3d 516, 530 (6th Cir. 2005); United States v. Paladino, 401 F.3d 471, 483 (7th Cir. 2005); United States v. Pirani, 406 F.3d 543, 553–54 (8th Cir. 2005); United States v. Ameline, 409 F.3d 1073, 1081 (9th Cir. 2005); United States v. Rodriguez, 406 F.3d 1261, 1262 (11th Cir. 2005); United States v. Coles, 403 F.3d 764, 767 (D.C. Cir. 2005). The Tenth Circuit, however, uses a different analysis according to whether the sentencing judge committed constitutional or statutory *Booker* error. If the error was constitutional, the court will require a lesser showing from the defendant, but if the error was statutory, the Tenth Circuit will not "notice [the] error unless [it] is 'particularly egregious' *and* failure to notice the error would result in a 'miscarriage of justice.'" United States v. Clifton, 406 F.3d 1173, 1182 (10th Cir. 2005) (citing United States v. Gonzalez-Huerta, 403 F.3d 727, 735) (emphasis in original).

10. The Court excised two sections of the statute: 18 U.S.C. § 3553(b)(1), the provision of the Act that makes the Guidelines mandatory; and § 3742(e), the provision that provides standards of review for appeal. *Booker*, 125 S. Ct. at 764.

11. 530 U.S. 466 (2000).

doubt."[12] A different majority of the Court left intact most of the remaining provisions of the Guidelines,[13] stating that without the provision making it mandatory, "the statute falls outside the scope of *Apprendi's* requirement."[14] The *Booker* decision thus attempts to sustain Congress's sentencing reform objective while at the same time protecting defendants' constitutional right to a jury trial.

Although the Sixth Amendment entitles criminal defendants to a trial by jury,[15] the Constitution does not elaborate upon what this right entails.[16] The Court, however, has interpreted the Sixth Amendment right to a jury trial as "no mere procedural formality, but a fundamental reservation of power in our constitutional structure . . . meant to ensure [the people's] control in the judiciary."[17] Accordingly, it is not surprising that the criminal defendant's right to a jury trial has clashed with attempts to standardize sentencing.[18] This clash between institutional reform and individual rights came to a head in *Booker*.

The *Booker* Court carefully noted that "[t]he ball now lies in Congress' court"[19] to enact legislation that does not violate the Constitution, but any legislative action will make no difference to those defendants sentenced prior to *Booker* and currently awaiting appeal. It is therefore necessary that the Court clarify *Booker*'s effect on the substantial rights prong of the plain error rule, not only for those defendants, but also for future defendants whose claims are unrelated to *Booker* but whose substantial rights have similarly been affected in such a way that requires a presumption of prejudice to ensure that all defendants receive procedural due process.[20]

12. *Booker*, 125 S. Ct. at 756.

13. The Court stated that even without the mandatory provision, judges must consider "the Guidelines together with other sentencing goals." *Id.* at 764. Accordingly, the Guidelines as they now exist are to be used by judges in an advisory fashion, as one among many factors to consider in sentencing. *Id.*

14. *Id.*

15. "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

16. R. Craig Green, Apprendi*'s Limits*, 39 U. RICH. L. REV. 1155, 1155 (2005).

17. Blakely v. Washington, 542 U.S. 296, 305–06 (2004).

18. Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 711 (2005).

19. *Booker*, 125 S. Ct. at 768.

20. As one commentator has noted, a guilt-based approach to appellate review of error, either for harmless error or plain error, has a

> tendency to undermine our most important legal principles. . . . Our system of justice stands above others only because it recognizes a sphere of personal liberty into which the government cannot intrude. Marking the boundary of this sphere are the individual rights guaranteed by our Constitution, and, to a lesser extent, by our laws. These rights, however, do not remain vital merely because they are enshrined in our most revered documents. They remain vital only if an active and alert federal judiciary stands ready to enforce them, even when their enforcement yields unpalatable results.

Part I of this Comment traces the developments leading up to the Court's decision in *Booker*; Part II examines the development of the substantial rights prong of plain error review. Part III discusses the circuit split created by the Court's decision in *Booker*, compares the approaches to substantial rights analysis taken by three of the federal appellate courts that have considered appeals of pre-*Booker* sentences,[21] and argues that the circuit split created by the Court's decision in *Booker* requires the Court to decide whether cases involving *Booker* error present an example of plain error that should be presumed prejudicial.[22] This Comment ultimately concludes that the Court should follow the approach taken by the Sixth Circuit, because this is the only approach that both considers the *Booker* opinion in its entirety and correctly analyzes the Court's plain error jurisprudence.

I. BACKGROUND

Until Congress enacted the Sentencing Reform Act of 1984, federal judges exercised enormous discretion in criminal sentencing.[23] In 1987, however, the Guidelines transformed the judge into an administrative fact-finder. Demoted from their traditional role, judges were now reduced to plugging facts into a formula created by the Commissioners to determine appropriate sentences.[24] In contrast to early colonial times in America and in England, where it was up to the jury to find beyond a reasonable doubt all elements necessary to a particular determinate sentence, the Guidelines required only that the judge find facts necessary for sentence enhancement by a preponderance of the evidence.[25] The Guidelines were intended to

Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1194–95 (1995).

21. This Comment compares opinions from the Sixth, Seventh, and Eleventh Circuits. A complete survey of post-*Booker* opinions from all twelve circuits is beyond the scope of this Comment.

22. In *United States v. Olano*, the Court declined to

> decide whether the phrase "affecting substantial rights" is always synonymous with "prejudicial." . . . There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.

507 U.S. 725, 735 (1993).

23. For a more complete discussion of the history of judicial discretion in criminal sentencing, see Klein, *supra* note 18, at 696–712. *See also* Rosemary T. Cakmis, *The Role of the Federal Sentencing Guidelines in the Wake of* United States v. Booker *and* United States. v. Fanfan, 56 MERCER L. REV. 1131, 1133 (2005) (stating that, prior to enactment of the Guidelines, federal judges had discretion to impose any sentence permissible under the statutory framework provided by the U.S. Code, from probation to the statutory maximum).

24. Klein, *supra* note 18, at 693–94.

25. *Id.* at 700.

increase uniformity in sentencing,[26] thereby promoting a more equitable criminal justice system, but in a series of cases that culminated in *Booker*, the Court determined that the Guidelines violated the Sixth Amendment by depriving the criminal defendant of his Sixth Amendment right to a jury trial as to those facts used to enhance sentences.

Although the constitutionality of the Guidelines was directly (and unsuccessfully) challenged on separation of powers and non-delegation grounds in 1989, it was not until 1999, in *Jones v. United States*, that the Court considered the Sixth Amendment implications of mandatory sentencing guidelines.[27] The Court relied on both statutory interpretation and the doctrine of constitutional doubt to avoid the actual constitutional issue, and interpreted the statute under which the defendant was charged not as outlining a single crime with three separate penalties, each contingent upon factors that need not be proved to a jury beyond a reasonable doubt, but instead as three distinct offenses.[28] As such, the provisions of the statute that set forth the maximum penalties were to be considered elements, not sentencing factors, and thus had to be proved to a jury beyond a reasonable doubt.[29] The Court observed in a footnote, however, that prior cases suggested that

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt.[30]

The following year, in *Apprendi v. New Jersey*, the Court directly addressed the issue hinted at in *Jones*.[31] *Apprendi* concerned a New Jersey criminal statute that allowed a defendant who was convicted by a jury of a second-degree offense to be subjected to punishment identical to that for first-degree offenses "based upon the judge's finding, [of additional facts] by a preponderance of the evidence . . . ."[32] The Court invalidated the statute on the basis that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

26. "Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity." United States v. Booker, 125 S. Ct. 738, 761 (2005).

27. 526 U.S. 227, 243 (1999). *Jones* involved a facial challenge to the federal carjacking statute, 18 U.S.C. § 2119.

28. *Id.* at 250–51.

29. Klein, *supra* note 18, at 703.

30. *Jones*, 526 U.S. at 235, 243 n.243. The Supreme Court carved out the recidivism exception in Almendarez-Torres v. United States. 523 U.S. 224, 230–35 (1998).

31. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

32. *Id.* at 491.

maximum must be submitted to a jury, and proved beyond a reasonable doubt."[33] Although *Apprendi* did not directly implicate the Guidelines, the decision was a landmark in modern sentencing law in that it brought the fate of the Guidelines into question.[34] Indeed, during oral argument, there was concern that the "rule might be applied to state and federal determinate sentencing guideline regimes";[35] the four *Apprendi* dissenters expressed their reservation that the Court's rule would invalidate the Guidelines[36] because "the Guidelines could survive only if the majority's logic were limited to statutory maxima."[37]

Despite the dissenters' fears, the Court did not revisit the questions raised by *Apprendi* until 2004, in *Blakely v. Washington*.[38] In *Blakely*, the Court used the rule announced in *Apprendi* to invalidate a Washington state law sentence[39] imposed under a sentencing scheme "remarkably similar in content" to the Guidelines.[40] The Court also explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[41] Many believed the decision signaled the demise of the Guidelines, causing one scholar to refer to *Blakely* as "the biggest criminal justice decision not just of this past term [2003], . . . but perhaps in the history of the Supreme Court."[42] "[T]he federal appellate courts re-

33. *Id.* at 490.

34. The *Apprendi* decision shifted authority from judge to jury, thereby affecting both federal and state criminal law practice. Prosecutors began to plead facts in the indictment as elements, which were then presented to a jury for a finding beyond a reasonable doubt. Klein, *supra* note 18, at 705–06.

35. *Id.* at 705.

36. As one commentator said,

> Although the *Apprendi* majority specifically noted (as the majority did in *Blakely*) that the federal sentencing guidelines were not before the Court, Justice O'Connor, in her dissent in *Apprendi*, stated that the principle announced by the majority "thus would apply . . . to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (e.g., the federal Sentencing Guidelines)." Justice O'Connor's dissent, which was joined by Chief Justice Rehnquist, Justice Breyer, and Justice Kennedy, went on to chastise the *Apprendi* majority for failing "to clarify the precise contours of the constitutional principle underlying its decision," which, according to the dissent, left "federal and state judges . . . in a state of limbo." In breaking from the "traditionally . . . cautious approach" of Supreme Court precedent, the dissent claimed: "The Court throws that caution to the wind and, in the process, threatens to cast sentencing in the United States into what will likely prove to be a lengthy period of considerable confusion."

Cakmis, *supra* note 23, at 1136–37. *See also Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting).

37. Green, *supra* note 16, at 1161 (italics omitted).

38. 524 U.S. 296 (2004).

39. *Id.* at 301.

40. Green, *supra* note 16, at 1163.

41. *Blakely*, 542 U.S. at 303 (emphasis in original).

42. Douglas Berman, *Supreme Court Cleanup in Aisle 4:* Blakely *Is Too Big and Messy to Ignore*, SLATE, July 16, 2004, http://www.slate.com/id/2104014/.

sponded to *Blakely* by producing one of the quickest, most robust circuit conflicts on record."[43]

In contrast to the four-year lag after its decision in *Apprendi*, the Court acted quickly after *Blakely*. Two separate cases, *United States v. Booker* and *United States v. Fanfan*, presented an opportunity for the Court to resolve the uncertainty.[44] The Court granted the Solicitor General's certiorari petitions in the two cases (later consolidated into *United States v. Booker*) on August 2, 2004, scheduling oral arguments for October 4, 2004.[45] Approximately four months later, on January 12, 2005, the Court delivered a two-part opinion in which it held: (1) that the mandatory aspect of the Guidelines violated the Sixth Amendment right to a jury trial;[46] and (2) the legislative intent behind the guidelines mandated a remedy of excision and severance, thus rendering the Guidelines advisory.[47] Part one of the opinion, authored by Justice Stevens,[48] discussed the Constitutional violations; part two, written by Justice Breyer,[49] discussed the remedy.

In part one, the Court reviewed the Sixth Amendment's requirement that every criminal defendant have the right to a jury trial, including the right that a jury, not a judge, "find [the defendant] guilty of all the elements of the crime with which he is charged."[50] In *Apprendi*, it was a "matter of simple justice . . . that the procedural safeguards designed to protect [the defendant] from punishment for [one crime] should apply equally to his

43. Green, *supra* note 16, at 1164. *See also* Cakmis, *supra* note 23, at 1145; Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 FED. SENTENCING REP. 316, 317–20 (2004) (collecting cases and describing circuit split); *infra* notes 107–23 and accompanying text.

44. As told by Klein,

> Mr. Booker was convicted by a jury of possession with intent to distribute 92.5 grams of crack cocaine, which led to a 210–262 month sentence under the Guidelines. At the sentencing hearing, however, the judge found by a preponderance of the evidence that Mr. Booker actually possessed an additional 566 grams of crack, and he therefore imposed an enhanced 360 month sentence. The Seventh Circuit reversed the sentence after finding that it violated Mr. Booker's Sixth Amendment right to a jury trial on the aggravating fact. The facts authorized by the jury verdict in Mr. Fanfan's drug trafficking case led to a seventy-eight month sentence under the Guidelines. At sentencing, the district judge found additional facts (additional quantities of cocaine and crack and that the defendant had been a leader) authorizing a 188–235 month sentence. Like the Seventh Circuit, the trial judge found *Blakely* applicable to the Guidelines and therefore sentenced Fanfan only to the lower seventy-eight months, to avoid a Sixth Amendment violation.

Klein, *supra* note 18, at 712–13.

45. Cakmis, *supra* note 23, at 1146.

46. United States v. Booker, 125 S. Ct. 738, 751–52.

47. *Id.* at 757.

48. The majority in part one was comprised of Justices Stevens, Scalia, Souter, Thomas, and Ginsberg. *Id.* at 746.

49. The majority in part two was comprised of Justice Breyer, Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Ginsberg. *Id.* at 756.

50. *Id.* at 748, 750 (quoting United States v. Gaudin, 515 U.S. 506, 511 (1995)).

violation of [another]."[51] Accordingly, any fact other than a previous conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[52] Following precedent, including the reasoning of *Blakely* and *Apprendi*, the Court determined in *Booker* that if the Guidelines were advisory rather than mandatory, their use would not implicate the Sixth Amendment because the defendant has no right to have a jury determine which facts a judge finds relevant when the judge is exercising her judicial discretion.[53]

Judges traditionally have been given discretion to increase sentences in accordance with blameworthiness.[54] As Justice Stevens pointed out, however, this tradition "does not provide a sound guide to enforcement of the Sixth Amendment's guarantee of a jury trial in today's world."[55] With increased pressure to be "tough on crime," legislation that regulates sentencing takes power away from the jury and gives it to the judge.[56] Confronted with the need to preserve the right to a jury trial in light of this new set of circumstances, the Court came to the answer it developed in the line of cases culminating with *Booker*:[57]

> More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. Those principles are unquestionably applicable to the Guidelines. They are not the product of recent innovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law. The Framers of the Constitution understood the threat of "judicial despotism" that could arise from "arbitrary punishments upon arbitrary convictions" without the benefit of a jury in criminal cases.[58]

In accordance with this statement, the Court reaffirmed *Apprendi*[59] and held that under the Guidelines, any fact necessary to sustain a sentence beyond the maximum authorized by the defendant's guilty plea or jury

51. The Court determined in *Apprendi* that "the procedural safeguards designed to protect Apprendi from punishment for the possession of a firearm should apply equally to his violation of the hate crime statute." *Id.* at 748 (citing Apprendi v. New Jersey, 530 U.S. 466, 476 (2000)).

52. *Id.* at 746 (quoting the Seventh Circuit's decision in Apprendi v. New Jersey, 375 F.3d 508, 510 (2004)).

53. *Id.* at 750 (citing Williams v. New York, 337 U.S. 241, 246 (1949)).

54. *Id.* at 750–51.

55. *Id.* at 751.

56. *Id.*

57. *Id.* at 752.

58. *Id.* at 753 (citation omitted).

59. In *Apprendi*, the Court held that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 756.

verdict "must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[60] Relying on its 1949 decision in *Williams v. New York*,[61] the Court stated that "everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the SRA the provisions that make the Guidelines binding on district judges."[62] Yet, as written, the Guidelines are not advisory, "they are mandatory and binding on all judges."[63]

In part two of *Booker*, the Court constructed a remedy to salvage the Guidelines while avoiding future Sixth Amendment violations: the Court severed and excised § 3553(b)(1), which made the Guidelines mandatory.[64] Dissenting from this second part of the opinion, Justice Stevens proposed that a requirement for jury fact-finding be grafted onto the Guidelines instead of severing and excising the two provisions.[65] The majority, however, determined that this approach was not in keeping with Congress's intent to increase uniformity in sentencing and correlate sentencing to "real conduct."[66] Acknowledging that the end result was a non-mandatory sentencing scheme, the Court stated only that it is now up to Congress to devise a standardized sentencing scheme that complies with the Constitution.[67]

With regard to those defendants currently awaiting appeal, for whom any Congressional action presumably will come too late, the Court indicated in *Booker* that both the Sixth Amendment holding and the remedial

60. *Id.*

61. 337 U.S. 241, 246 (1949). *See also* Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1095 (2005). ("*Williams* is frequently cited for its statement on the breadth of factfinding at sentencing available to trial courts in indeterminate sentencing structures: 'A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.'").

62. *Booker*, 125 S. Ct. at 750.

63. *Id.*

64. The Court also excised § 3742(e), which "sets forth standards of review on appeal," because the provision made reference to the mandatory nature of the Guidelines. *Id.* at 764.

65. Justice Stevens's approach

> would retain the Sentencing Act (and the Guidelines) as written, but would engraft onto the existing system [the Court's] Sixth Amendment "jury trial" requirement. The addition would change the Guidelines by preventing the sentencing court from increasing a sentence on the basis of a fact that the jury did not find (or that the offender did not admit).

Id. at 757.

66. The Court cited five reasons for this conclusion: (1) the statutory language and history supports a reading that the judge, not the jury, is intended to consider "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) the link between sentencing and real conduct would be weakened, thereby decreasing, rather than increasing uniformity in sentencing; (3) the system would become overly complex, and it would be impossible to administer; (4) prosecutors would have too much power over sentencing, further decreasing uniformity; and (5) the new system would "make it more difficult to adjust sentences *upward* than to adjust them *downward*." *Id.* at 758–64 (emphasis in original).

67. *Id.* at 768.

holding must be applied to all cases on direct review.[68] This does not mean that all sentences imposed under the mandatory Guidelines will violate the Sixth Amendment. Federal appellate courts have correctly recognized two separate *Booker* errors. The sentencing judge may have committed a constitutional error by enhancing the defendant's sentence pursuant to facts found by the judge, not a jury, because the "Sixth Amendment requires juries, not judges, to find facts relevant to sentencing."[69] The sentencing judge may also have committed a non-constitutional (statutory or procedural) error, which arises out of the second part of the *Booker* opinion: even if a sentencing judge did not enhance the defendant's sentence pursuant to facts found by the judge rather than the jury, the judge would err by sentencing a defendant under guidelines presumed to be mandatory rather than advisory.[70]

In its remedial holding, the Court emphasized that all appeals should end with a new sentencing hearing: reviewing courts are expected "to apply ordinary prudential doctrines" such as the plain error test.[71] Nonetheless, the Court affirmed the judgment of the Seventh Circuit, and remanded Booker's case to the district court for resentencing.[72] The Court also remanded respondent Fanfan's case because although his sentence does not violate the Sixth Amendment, "the Government (and the defendant should he so choose) may seek resentencing under the system set forth in [the Court's] opinions."[73] The Court's remand of both cases for resentencing provides valuable instruction to federal appellate courts about the direction they should follow in applying the substantial rights prong of plain error review: the sentencing judge may have committed a constitutional or a non-constitutional error (or both), and at least some cases must be remanded for resentencing.[74]

68. *Id.* at 769.

69. *Id.* at 756.

70. *See* United States v. Gonzalez-Huerta, 403 F.3d 727, 731–32 (10th Cir. 2005).

71. *Booker*, 125 S. Ct. at 769.

72. The Seventh Circuit remanded the case to the district court, holding that the lower court's application of the Guidelines conflicted with the Supreme Court's holding in *Apprendi*. *Id.* at 746, 769.

73. *Id.* at 769.

74. *See* United States v. Hughes, 401 F.3d 540, 552–53 (4th Cir. 2005).

II. PLAIN ERROR REVIEW

The plain error doctrine,[75] which evolved from the common law, has been recognized by the United States Supreme Court at least since 1896.[76] It was not until 1993, however, in *United States v. Olano*, that the Court clarified the standard for plain error review,[77] which it refined in *United States v. Cotton*:[78] "before an appellate court can correct an error not raised at trial,[79] there must be (1) 'error,' (2) that is 'plain,' . . . (3) that 'affect[s] substantial rights[,]'" and (4) that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."[80] The third prong usually means that the error must have prejudiced the defendant by affecting the outcome of the case during trial.[81] The burden typically is on the defendant to show that the error was prejudicial,[82] but there are two exceptions to this rule: structural errors and errors that are presumed to be prejudicial.[83]

A. Structural Error Exception

Structural errors are mistakes that undermine "the fairness of a criminal proceeding as a whole[, such that] even preserved error requires rever-

75. The doctrine is codified in Federal Rule of Criminal Procedure 52(b), which states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. CRIM. P. 52(b).

76. Jeffrey L. Lowry, *Plain Error Rule—Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure*, 84 J. CRIM. L. & CRIMINOLOGY 1065, 1065 (1994).

77. Federal appellate courts may review an error that was not noticed if the error is plain and it affects substantial rights. "Moreover, Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" United States v. Olano, 507 U.S. 725, 731–32 (citing United States v. Young, 470 U.S. 1, 15 (1985)).

78. 535 U.S. 625, 631–32 (2002).

79. Errors that were properly raised at trial are governed by the harmless error rule. FED. R. CRIM. P. 52(a). For a complete discussion of the rule, see Roger J. Traynor, THE RIDDLE OF HARMLESS ERROR (1970); *see also* Edwards, *supra* note 20.

80. *Cotton*, 535 U.S. at 631–32 (quoting Johnson v. United States, 520 U.S. 461, 466–67 (1997)).

81. *Olano*, 507 U.S. at 734.

82. The substantial rights inquiry is the same under plain error or harmless error, "with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* "In cases where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief, we have invoked a standard with similarities to the *Kotteakos* formulation in requiring the showing of 'a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different.'" United States v. Dominguez Benitez, 542 U.S. 74, 81–82 (2004) (citing United States v. Bagley, 473 U.S. 667, 682 (1985)). In *Kotteakos v. United States*, the Court held that in cases where the reviewing judge is not certain the judgment was unaffected by the error, there was an effect on the defendant's substantial rights. 328 U.S. 750, 763–64 (1946). *See also* Edwards, *supra* note 20, at 1175.

83. *See Olano*, 507 U.S. at 735.

sal without regard to the mistake's effect on the proceeding."[84] As the Court explained in *Arizona v. Fulminante*, a structural error is a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."[85] In such cases, the error may not be found harmless regardless of whether the defendant is able to demonstrate prejudice sufficient to satisfy the requirement of affecting substantial rights. The Court has found such defects in only a limited set of cases,[86] however, and seems disinclined to extend the doctrine,[87] subsequently holding that "[i]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are [not structural errors]."[88]

In certain cases, where structural errors undermine "the fairness of a criminal proceeding as a whole," a court may reverse "without regard to the mistake's effect on the proceeding."[89] In most cases, however, an error will not be considered to affect substantial rights unless the defendant can show that "the result of the proceeding would have been different" if the error had not occurred.[90] In *United States v. Dominguez Benitez*, the Court addressed the question of what showing the defendant must make to obtain relief when the trial court fails to give a warning required by Federal Rule of Criminal Procedure 11.[91] Declining to extend the structural error extension to Dominguez Benitez, the Court held that to obtain relief, the defendant "must show a reasonable probability that, but for the error, he would not have entered the plea."[92]

84. *Dominguez Benitez*, 542 U.S. at 81 (citing Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991)).

85. 499 U.S. at 310.

86. *See* Johnson v. United States, 520 U.S. 461, 468–69 (1997) (citing Gideon v. Wainwright, 372 U.S. 335 (1963) (a total deprivation of the right to counsel); Tumey v. Ohio, 273 U.S. 510, (1927) (lack of an impartial trial judge); Vasquez v. Hillery, 474 U.S. 254 (1986) (unlawful exclusion of grand jurors of defendant's race); McKaskle v. Wiggins, 465 U.S. 168 (1984) (the right to self-representation at trial); Waller v. Georgia, 467 U.S. 39 (1984) (the right to a public trial); Sullivan v. Louisiana, 508 U.S. 275 (1993) (erroneous reasonable doubt instruction to jury)).

87. In *Cotton*, the Court did not reach the question of whether an indictment error fell within the class of structural error because it resolved the case by determining that "the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." United States v. Cotton, 535 U.S. 625, 632–33 (2002). *See also Johnson*, 520 U.S. at 466, 469 (The Court did not reach the question of whether the district court's failure to submit an element of the false statement offense to the petit jury constituted structural error.).

88. United States v. Gonzalez-Huerta, 403 F.3d 727, 734 (10th Cir. 2005) (quoting Neder v. United States, 527 U.S. 1, 8 (1999)).

89. *Dominguez Benitez*, 542 U.S. at 81 (citing *Fulminante*, 499 U.S. at 309–10).

90. *Id.* at 81–82 (citing United States v. Bagley, 473 U.S. 667, 682 (1985)).

91. The district court failed to warn the defendant that his plea of guilty could not be withdrawn if the court did not accept the Government's recommendations. *Id.* at 77.

92. *Id.* at 83.

To justify this decision, the Court cited the policies behind the plain error doctrine[93] and the "particular importance of the finality of guilty pleas, . . . [which] are indispensable in the operation of the modern criminal justice system."[94] *Dominguez Benitez* provided no reason to depart from the general rule, however, because the claimed violation was not of due process, but of Rule 11, a distinction, according to the Court, worthy of repetition.[95] This distinction is particularly apt in light of the fact that *Booker* is the progeny of *Jones* and *Apprendi*, which involved not only the jury trial guarantees of the Sixth Amendment, but also due process rights under the Fifth and Fourteenth Amendments.[96]

B. Presumption of Prejudice Exception

The second category of errors that may be corrected without requiring the defendant to show prejudice is where the defendant "cannot make a specific showing of prejudice" and therefore the error should be "presumed prejudicial."[97] While the *Olano* Court raised the possibility that such a category might exist, it did not provide examples, stating only that there might be some errors that should be presumed prejudicial because of the difficulty of making a specific showing of prejudice.[98] The Court has not considered the possibility of presumed prejudice again since *Olano*, but neither has it repudiated the language.[99]

Appellate review of plain errors is discretionary,[100] but federal appellate courts should correct plain errors that affect "substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"[101] In *Olano*, which involved a violation of Federal Rule

93. As explained by the Court, the policies underpinning Rule 52(b) are "to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *Id.* at 82.

94. *Id.* at 82–83.

95. *Id.* at 83.

96. *See* Jones v. United States, 526 U.S. 227, 243 (1999); *see also* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).

97. United States v. Olano, 507 U.S. 725, 735 (1993).

98. *Id.*

99. *See* United States v. Gonzalez-Huerta, 403 F.3d 727, 756 (10th Cir. 2005) (Briscoe, J., concurring in part and dissenting in part) (arguing that although the Court has not mentioned the category of presumed prejudice since *Olano*, "it is equally true that the Supreme Court has never expressly repudiated the language").

100. Plain error review allows appellate courts to correct errors not raised at trial. For a more complete discussion, see Hoskinson, *supra* note 8, at 1131.

101. *Olano*, 507 U.S. at 736 (citing United States v. Atkinson, 297 U.S. 157, 160 (1936)).

of Criminal Procedure 24(c),[102] the Court determined that the ultimate inquiry is whether the intrusion affected the jury's deliberations and subsequent verdict.[103] Deciding that it did not, the Court held that the court of appeals lacked authority to correct the error because the error did not affect substantial rights.[104] Dissenting from the majority opinion, Justice Stevens declared that some defects are subject to reversal even if prejudice cannot be shown, "not only because it is so difficult to measure their effects . . . but also because such defects 'undermin[e] the structural integrity of the criminal tribunal itself.'"[105]

As properly understood,[106] *Booker* error, unlike the error at issue in *Dominguez Benitez*, implicates the Sixth Amendment right to a jury trial and the Fifth and Fourteenth Amendment rights to due process. Moreover, *Booker* error involves no countervailing interest such as the finality of guilty pleas. Accordingly, cases involving *Booker* error should be exempt from the general rule requiring defendants to demonstrate prejudice in order to obtain relief.

III. THE SUPREME COURT MUST PROVIDE GUIDANCE TO THE LOWER COURTS REGARDING *BOOKER*'S EFFECT ON SUBSTANTIAL RIGHTS

The disparate post-*Booker* opinions delivered by the federal appellate courts are in direct opposition to Congress's intent to increase uniformity in sentencing, which the Supreme Court sought to uphold in *Booker*. This lack of congruity among the circuits demonstrates that the Supreme Court's failure to outline the proper application of the third prong of the plain error test must be remedied. Furthermore, the circuit split provides an opportunity for the Court to clarify which errors should be presumed prejudicial when the defendant will have great difficulty in making a specific showing of prejudice.

The sea change created by *Booker* makes it "impossible to tell what considerations counsel for both sides might have brought to the sentencing judge's attention had they known that they could urge the judge to impose a

102. As restated by *Olano*, Rule 24(c) says, "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." *Id.* at 730 (citing FED. R. CRIM. PROC. 24(c)). The rule was violated by the presence of alternate jurors during deliberations. *Id.* at 737.

103. *Id.* at 739. *See also* Kotteakos v. United States, 328 U.S. 750, 764 (1946) (stating that the question is not whether the jury reached the correct verdict despite the error, but "rather what effect the error had or reasonably may be taken to have had upon the jury's decision").

104. *Olano*, 507 U.S. at 741.

105. *Id.* at 743 (quoting Vasquez v. Hillery, 474 U.S. 254, 263–64 (1986)).

106. *See* discussion *infra* Part III.

non-Guidelines sentence."[107] For example, under advisory Guidelines, defense "counsel are now able to present aggravating and mitigating circumstances 'that existed at the time [of pre-*Booker* sentencing] but were not available for consideration under the mandatory Guidelines regime.'"[108] Such an omission presents an example of a situation in which a defendant is prejudiced, but will be unable to demonstrate that prejudice on appeal because the record cannot reflect events that did not occur at trial. Accordingly, the Court should address whether cases implicating *Booker* or similar error, where most defendants cannot make a specific showing of prejudice, require a presumption of prejudice to assure that those defendants are not denied due process.

Each of the twelve circuits has taken a slightly different tack in dealing with direct review of *Booker* error, but the opinions can be generally classified into three broad categories. In the Category One, the court applies the conventional plain error doctrine expounded in *United States v. Olano*.[109] The First, Fifth, Eighth, Tenth, and Eleventh Circuits follow this approach, which requires the defendant to demonstrate by a reasonable probability that the district court would have imposed a more lenient sentence under an advisory-Guidelines scheme.[110] Within this first category, the First, Fifth, and Eighth Circuits have concluded that the sentencing judge erred only by applying the Guidelines as mandatory,[111] and thus no error would have occurred had the Guidelines been advisory. The Tenth[112] and Eleventh[113] Circuits recognize two separate errors, one constitutional, the other statutory. Regardless of whether the court analyzes the error as constitutional or statutory, defendants usually are unable to meet this burden absent a clear statement by the sentencing judge that she would have imposed a different sentence if the Guidelines were advisory, not manda-

107. United States v. Crosby, 397 F.3d 103, 115 (2d Cir. 2005).

108. United States v. Barnett, 398 F.3d 516, 528 (6th Cir. 2005) (citing *Crosby*, 397 F.3d at 118).

109. *See* United States v. Antonakopoulos, 399 F.3d 68, 75 (1st Cir. 2005); United States v. Mares, 402 F.3d 511, 521 (5th Cir. 2005); United States v. Pirani, 406 F.3d 543, 551–52 (8th Cir. 2005); United States v. Gonzalez-Huerta, 403 F.3d 727, 733 (10th Cir. 2005); United States v. Rodriguez, 398 F.3d 1291, 1299 (11th Cir. 2005).

110. *See* United States v. Epstein, 426 F.3d 431, 443 (1st Cir. 2005); United States v. Smith, 417 F.3d 483, 489 (5th Cir. 2005); United States v. Norman, 427 F.3d 537, 539 (8th Cir. 2005); United States v. Jones, 425 F.3d 1274, 1276 (10th Cir. 2005); United States v. York, 428 F.3d 1325, 1336 (11th Cir. 2005).

111. The Fifth Circuit explained that "the error is the imposition of a sentence, which was enhanced by using judge found facts, not admitted by the defendant or found by the jury, in a mandatory Guidelines system." *Mares*, 402 F.3d at 521.

112. See *supra* note 3.

113. According to the Eleventh Circuit, the constitutional error is only that the sentencing judge used extra-verdict enhancements in a mandatory system, not that she used extra-verdict enhancements at all. *Rodriguez*, 398 F.3d at 1300.

tory.[114] Accordingly, for defendants in these circuits who were sentenced under the pre-*Booker* Guidelines, the Court's determination that the mandatory Guidelines violated defendants' Sixth Amendment right to a jury trial makes absolutely no difference unless the sentencing judge made a statement, on the record, indicating a desire to deviate from the Guidelines. Prior to *Booker*, however, "well-established case law substantially undermined any need or incentive for sentencing courts . . . to note their objections and reservations in sentencing defendants under the then-mandatory guidelines."[115]

Recognizing this problem, the Second, Seventh, Ninth, and D.C. Circuits have determined that the appellate court cannot properly apply plain error doctrine unless the case is first remanded to the district court to discover whether the judge would impose a lesser sentence under advisory, rather than mandatory Guidelines.[116] These circuits comprise the Category Two. Essentially, the Category Two procedure is precisely the same form of conventional plain error analysis used by the circuits in Category One.[117] The important difference is that these circuits, unlike those in the Category One, will not withhold Sixth Amendment rights from those defendants whose sentencing judges failed to mention a desire to impose a lesser sentence. Furthermore, the Second, Seventh, Ninth, and D.C. circuits, like the Tenth and Eleventh Circuits, recognize two separate types of *Booker* error: constitutional error if the sentencing judge used extra-verdict enhancements, and non-constitutional (referred to as procedural or statutory) error if the sentencing judge presumed the Guidelines to be mandatory rather than advisory.[118] Either type of error will require the limited remand approach adopted by these circuits.[119]

114. *See* United States v. Barnett, 398 F.3d 516, 528 (10th Cir. 2005); *see also Gonzalez-Huerta*, 403 F.3d at 752–53 (Briscoe, J., concurring in part and dissenting in part).

115. *Barnett*, 398 F.3d at 529.

116. *See* United States v. Crosby, 397 F.3d 103, 117 (2d Cir. 2005); United States v. Paladino, 401 F.3d 471, 483–84 (7th Cir. 2005); United States v. Ameline, 409 F.3d 1073, 1074 (9th Cir. 2005); United States v. Coles, 403 F.3d 764, 765 (D.C. Cir. 2005).

117. "[P]lain error analysis as it relates to *Booker* errors depends on whether the district judge would have imposed the same sentence had he known that the guidelines were merely advisory." United States v. Caldwell, 423 F.3d 754, 762 (7th Cir. 2005). *See also* United States v. Moreno-Hernandez, 419 F.3d 906, 915 (9th Cir. 2005).

118. *See Crosby*, 397 F.3d at 114; United States v. Schlifer, 403 F.3d 849, 853 (7th Cir. 2005); *Ameline*, 409 F.3d at 1084.

119. The Second Circuit differs from the others in that it does not retain jurisdiction over the case, but requires the sentencing court "*itself* [to] vacate the original sentence if it determines that resentencing is warranted." *Coles*, 403 F.3d at 770 (citing *Crosby*, 397 F.3d at 117, 120) (emphasis in original).

The Third, Fourth, and Sixth Circuits, comprising Category Three, also recognize two separate types of *Booker* error.[120] These circuits, however, recognizing that the defendant will rarely be able to prove that the outcome would have been different under advisory Guidelines, have adopted the presumption of prejudice approach to plain error review that the Court raised in *Olano*.[121] The Third and Sixth Circuits presume prejudice regardless of whether the *Booker* error is constitutional or non-constitutional, whereas the Fourth Circuit will presume prejudice only where the sentencing judge committed constitutional error.[122] Accordingly, in cases where the sentencing judge committed constitutional error and where it is not clear "whether the District Court would have imposed a greater or lesser sentence under an advisory framework," the Third, Fourth, and Sixth Circuits will automatically remand all cases where the "appellant raises a *Booker* claim and establishes plain error."[123]

While important distinctions exist among each of the twelve approaches,[124] this Comment will discuss the approaches more generally, focusing on one representative case from each of these three broad categories and using cases from the other circuits to further illustrate that representative. These categories are ideally represented by opinions from the Eleventh,[125] the Seventh,[126] and the Sixth Circuits.[127] Of the three, the Sixth Circuit's presumption of prejudice approach to the substantial rights prong of plain error review best satisfies the opposing demands of judicial efficiency and due process implicated by the Court's decision in *Booker*.

120. *See* United States v. Davis, 407 F.3d 162, 163–64 (3d Cir. 2005); United States v. Hughes, 401 F.3d 540, 553 (4th Cir. 2005); *Barnett*, 398 F.3d at 527.

121. *See Davis*, 407 F.3d at 165; *Hughes*, 401 F.3d at 548; *Barnett*, 398 F.3d at 527–28.

122. Where the defendant asserts that the error committed was non-constitutional, the Fourth Circuit, like those circuits in Category One, shifts the burden to the defendant to demonstrate prejudice. United States v. White, 405 F.3d 208, 216–23 (4th Cir. 2005).

123. *Davis*, 407 F.3d at 165–66. *See also* United States v. Ebersole, 411 F.3d 517, 535 (4th Cir. 2005).

124. *See supra* notes 9, 111, 113, 119, 122; *see also infra*, note 133.

125. *See* United States v. Rodriguez, 398 F.3d 1291 (11th Cir. 2005).

126. *See* United States v. Paladino, 401 F.3d 471 (7th Cir. 2005).

127. *See* United States v. Barnett, 398 F.3d 516 (6th Cir. 2005).

A. Eleventh Circuit

The Eleventh Circuit reviewed opinions from the Fourth,[128] Sixth,[129] and Second[130] Circuits prior to issuing its decision in *United States v. Rodriguez*.[131] In its analysis, the *Rodriguez* court initially declared that "plain error review should be exercised 'sparingly.'"[132] In line with the other circuits, the court determined that the first two prongs of the plain error test are met by any case involving *Booker* error.[133] Contrary to its sister circuits, however, the Eleventh Circuit has determined for purposes of plain error review that the constitutional error[134] in *Booker* is not the Sixth Amendment violation but rather "that there [are] extra-verdict enhancements used in a mandatory guidelines system."[135] Believing the sentencing judge erred only by using the Guidelines in a mandatory fashion, the court next inquired "whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge."[136] This inquiry is flawed because it is based on a fundamentally incorrect interpretation of the Court's decision in *Booker*.

Although the Second Circuit similarly recognizes only one constitutional *Booker* error, its approach differs from the Eleventh Circuit in that the Second Circuit combines the Sixth Amendment violation of extra-

128. United States v. Hughes, 396 F.3d 374 (4th Cir. 2005). Subsequent to filing the original opinion discussed by the *Rodriguez* court, the Fourth Circuit voted to grant panel rehearing and issued an amended opinion on March 16, 2005. *See* United States v. Hughes, 401 F.3d 540, 544 n.2 (4th Cir. 2005).

129. *See* United States v. Oliver, 397 F.3d 369 (6th Cir. 2005).

130. *See* United States v. Crosby, 397 F.3d 103 (2d Cir 2005).

131. 398 F.3d 1291, 1301 (11th Cir. 2005).

132. *Id.* at 1298 (citing Jones v. United States, 527 U.S. 373, 389 (1999)).

133. A thorough examination of the federal appellate courts' application of plain error doctrine is beyond the scope of this Comment. All twelve circuits that have reviewed *Booker* appeals have determined that the first two prongs are met by constitutional error, non-constitutional error, or both. All circuits except the Tenth presume the fourth prong will be met when the third is satisfied. *See* United States v. Clifton, 406 F.3d 1171, 1180 (10th Cir. 2005). This Comment therefore will focus only on the third prong of plain error review, the substantial rights prong.

134. In the initial *Rodriguez* decision, the Eleventh Circuit recognized only one *Booker* error. Subsequently, however, the court recognized a second form of *Booker* error. Despite its later recognition that *Booker* caused two separate errors, the Eleventh Circuit fails to recognize that its definition of the constitutional *Booker* error is incorrect. "Because the effect of *Booker* error is the same regardless of the type, our decisions make no functional distinction between constitutional and statutory error. For purposes of the plain error rule, unpreserved error is unpreserved error." United States v. Rodriguez, 406 F.3d 1261, 1262 (11th Cir. 2005).

135. United States v. Rodriguez, 398 F.3d 1291, 1300 (11th Cir. 2005). The *Rodriguez* court supports this contention with two reasons: (1) part one of *Booker* states that the Guidelines' use would not implicate the Sixth Amendment if they were advisory rather than mandatory; and (2) part two of *Booker* "specifically provides for extra-verdict enhancements in all future sentencings." *Id.*

136. *Id.* at 1301.

verdict enhancements with the mandatory aspect.[137] The Eleventh Circuit, by contrast, rests its analysis on the erroneous contention that extra-verdict enhancements are *not* to be considered as part of the constitutional error.[138] This approach leads the court to an extremely simplistic view of substantial rights analysis, in which it determines that "the prejudicial impact of the error . . . must be gauged in terms of the part of the procedure that is to be changed."[139] Accordingly, defendants must show "a reasonable probability" that the district court would have imposed a lesser sentence if it had viewed the Guidelines as being advisory rather than mandatory.[140] If the answer is unclear, which it almost always will be, the defendant has not met his burden of showing that his substantial rights have been affected, and remand is denied.[141] This test is incorrect both because it relies on a faulty interpretation of *Jones v. United States*[142] and because it disregards the importance of procedural safeguards, recognized not only by the Court's dual holding in *Booker*,[143] but also in *Olano*[144] and *Dominguez Benitez*.[145]

The *Rodriguez* court relies on *Jones* to support the proposition that where "the effect of the error is uncertain so that we do not know which, if either, side it helped the defendant loses."[146] This is incorrect because it directly contradicts the Court's holding in *Kotteakos v. United States*: in cases where the reviewing judge is not certain the judgment was unaffected

137. In *Crosby*, the court stated,

> [A] sentencing judge would violate the Sixth Amendment by making factual findings and *mandatorily* enhancing a sentence above the range applicable to facts found by a jury or admitted by a defendant. . . . Second, and less obviously, a sentencing judge would commit procedural error by *mandatorily* applying the applicable Guidelines range that was based solely on facts found by a jury or admitted by a defendant.

United States v. Crosby, 397 F.3d 103, 114 (2d Cir. 2005).

138. *See Rodriguez*, 398 F.3d at 1301.

139. *Id.* at 1302.

140. *Id.* at 1301.

141. *Id.*

142. 527 U.S. 373 (1999).

143. In *Booker*, the Court stated, "As a matter of simple justice, it seemed obvious that the procedural safeguards designed to protect Apprendi from punishment for the possession of a firearm should apply equally to his violation of the hate crime statute." United States v. Booker, 125 S. Ct. 738, 748 (2005). Although this discussion did not arise in the context of plain error review, it is clear that the Court views procedural safeguards as a fundamental part of our criminal justice system.

144. *See* United States v. Olano, 507 U.S. 725, 745 (1993) (Stevens, J., dissenting) (discussing importance of procedural safeguards).

145. Deciding that the burden of establishing prejudice for the purpose of plain error review "should not be too easy for defendants in Dominguez's position," the Court carefully noted that this was so, in part, because the violation claimed was not of due process. United States v. Dominguez Benitez, 542 U.S. 74, 82–83 (2004).

146. *Rodriguez*, 398 F.3d at 1300.

by the error, there was an effect on the defendant's substantial rights.[147] The Court affirmed this holding in *O'Neal v. McAninch*, explaining that "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win."[148] Although *O'Neal* arises in the context of a habeas petition, the Court's decision is based on *Kotteakos*.[149] As such, it applies not only to the standard federal appellate courts should use in harmless error review, but also in the standard to be used in plain error review, because, as the Court stated in *Olano*, the inquiry regarding prejudice is the same under both.[150]

The *Rodriguez* court also errs by disregarding the importance of procedural safeguards to our criminal justice system. The Court's two-part *Booker* opinion clearly held that sentencing courts erred not only by applying the Guidelines in a mandatory fashion, but also by using extra-verdict enhancements that deprive a defendant of his Sixth Amendment right to a jury trial. The Eleventh Circuit disregards this latter part of the holding reasoning that "[e]xtra-verdict enhancements are to be determined and used in the post-*Booker* world."[151] This simplistic justification fails, however, because it does not fully consider the import of the third prong of the plain error test.[152] As observed by the Fourth Circuit, "[c]onsidering the *Booker*

147. 328 U.S. 750, 764 (1946). *See also* Edwards, *supra* note 20, at 1175.

148. 513 U.S. 432, 436 (1995).

149. *Id.* at 439; *see also* Edwards, *supra* note 20, at 1203.

150. United States v. Olano, 507 U.S. 725, 734 (1993).

151. *Rodriguez*, 398 F.3d at 1301.

152. Indirectly addressing the position taken by the Eleventh Circuit, the Seventh Circuit points out an important distinction overlooked by the *Rodriguez* court—there is a

> difference between the guilt phase of a case and the punishment phase. Guilt is either-or; the defendant is either guilty or innocent. If an error is committed and the defendant is convicted, the appellate court has only to consider whether the defendant would probably have been acquitted had the error not occurred. If so—if the error may well have precipitated a miscarriage of justice (which the conviction of an innocent person is)—it is a plain error and the defendant is entitled to a new trial. But sentencing is not either-or; it is the choice of a point within a range established by Congress, and normally the range is a broad one.

United States v. Paladino, 401 F.3d 471, 482 (7th Cir 2005). Accordingly, "it is impossible for a reviewing court to determine—*without consulting the sentencing judge . . .*—whether the judge would have [given the same sentence even if the Guidelines were merely advisory]." *Id.* In contrast to the Eleventh Circuit, the Seventh Circuit does not end the inquiry there, but instead continues with its analysis:

> [I]f . . . the sentencing judge might well have decided to impose a lighter sentence than dictated by the guidelines had he not thought himself bound by them, his error in having thought himself bound may have precipitated a miscarriage of justice. It is a miscarriage of justice to give a person an illegal sentence that increases his punishment, just as it is to convict an innocent person. . . . To tell a defendant we know your sentence would have been 60 months shorter had the district judge known the guidelines were merely advisory, because he's told us it would have been—but that is your tough luck and you'll just have to stew in prison for 60

remedy in determining whether a defendant has established an effect on substantial rights from a pre-*Booker* Sixth Amendment violation would essentially require [the reviewing court] to disregard the Sixth Amendment error altogether."[153]

Even though, as the *Rodriguez* court emphasized,[154] the Court recognized that there would be no Sixth Amendment violation if the original Guidelines had been written as advisory, they were *not* advisory. Prior to the Court's decision in *Booker*, the Guidelines were "mandatory and binding on all judges,"[155] thereby depriving the sentencing judge of discretion. Accordingly, the sentencing judge who used extra-verdict enhancements prior to the Court's decision in *Booker* erred not only by using the Guidelines in a mandatory fashion, but also by depriving the defendant of his Sixth Amendment right to a trial by jury.

The Eleventh Circuit's approach is incorrect because it focuses only on the second part of the Court's *Booker* opinion, completely disregarding the Sixth Amendment error committed by judicial use of extra-verdict enhancements.[156] Although it is true that sentencing judges will be able to consider extra-verdict enhancements post-*Booker*, that consideration will be tempered by other relevant factors, including mitigating evidence offered by defendants. Moreover, part one of the Court's decision in *Booker* placed enormous emphasis on the importance of the traditional guarantee of a jury trial to protect the "fairness and reliability" of our criminal justice system.[157] While it is undeniably true that a logical disconnect exists between *Booker*'s two parts,[158] that disconnect does not negate *Booker*'s holding that extra-verdict sentencing under mandatory guidelines violated a defendant's Sixth Amendment rights. The Eleventh Circuit's focus on the mandatory aspect and corresponding disregard for the Sixth Amendment error thus undermines the fairness, integrity, and public repute of the federal judiciary process regardless of whether the defendant is able to demonstrate prejudice.

> additional months because of an acknowledged violation of the Constitution—would undermine the fairness, the integrity, and the public repute of the federal judicial process.

Id. at 483 (emphasis in original) (citations omitted).

153. United States v. Hughes, 401 F.3d 540, 551 (4th Cir. 2005).

154. *Rodriguez*, 398 F.3d at 1300.

155. United States v. Booker, 125 S. Ct. 738, 750 (2005).

156. According to the Eleventh Circuit, the constitutional error is only that the sentencing judge used extra-verdict enhancements in a mandatory system, not that she used extra-verdict enhancements at all. *Rodriguez*, 398 F.3d at 1300.

157. *Booker*, 125 S. Ct. at 756.

158. "The source of the logical disconnect between the two opinions was deep within the jurisprudence itself." Reitz, *supra* note 61, at 1096.

Contrary to the Eleventh Circuit's opinion in *Rodriguez*, the error in *Booker* appeals is not only that extra-verdict enhancements were used in a mandatory guidelines system, but also that the Sixth Amendment rights of these defendants have been violated. The *Rodriguez* court's decision to deny remand to all such defendants across the board[159] because they cannot meet an impossible test[160] is contrary to the requirements of procedural due process and, indeed, simple justice. The Eleventh Circuit's approach to the third prong of plain error review thus is not appropriate for review of *Booker* appeals, and is symptomatic of the adverse effect of the Supreme Court's failure to provide proper guidance to the lower courts.

In both its plain error jurisprudence and the line of cases culminating in *Booker*, the Court is striving to achieve a balance between the demands of crime control and judicial efficiency on the one hand, and a defendant's right to procedural due process on the other. The Eleventh Circuit's approach to the substantial rights prong certainly facilitates the former, but it fails to consider the defendant's constitutional rights to a jury trial. Failure to consider this violation of constitutional rights deprives the defendant of his right to procedural due process, and therefore does not comport with the Supreme Court's decision in *Booker*.

B. Seventh Circuit

The approach taken by the Seventh Circuit, while not as overtly flawed as that of the Eleventh Circuit, also is not appropriate for direct review of *Booker* error. Like the Eleventh Circuit, the Seventh Circuit had the benefit of reading the opinions of several other circuits prior to deciding its first *Booker* error cases.[161] The Seventh Circuit follows a similar path to

159. The Eleventh Circuit does leave open the possibility that a defendant may receive a remand, but only if there is some clear indication that the sentencing judge acted as she did only because the Guidelines were mandatory. Such a clear indication is exceedingly unlikely, however, and the result of the approach taken by the Eleventh Circuit is to automatically deny remand to most, if not all, defendants. *See* United States v. Shelton, 400 F.3d 1325, 1333–34 (11th Cir. 2005).

160. According to an Eighth Circuit judge,

> [I]t is impractical, if not impossible, to gauge the prejudice actually suffered by a defendant sentenced under a mandatory as opposed to an advisory guideline regime. The duty of showing prejudice which the majority seeks to bestow on a defendant is like asking a defendant to prove the existence of a divine-being or the existence of life on a planet other than our own. The evidence either does not exist or is beyond the defendant's mere human capabilities, thus any attempt to explain how a defendant may meet this showing, without an explicit statement on the record by the sentencing judge, is nothing more than an empty exercise in casuistry.

United States v. Pirani, 406 F.3d 543, 564 (8th Cir. 2005) (Bye, C.J., concurring in part and dissenting in part).

161. The Seventh Circuit's opinion cites opinions of post-*Booker* decisions from the Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits. United States v. Paladino, 401 F.3d 471, 483–84 (7th Cir. 2005).

that taken by the Eleventh Circuit in that the court concludes it is impossible for a reviewing court to determine whether the defendant suffered prejudice because there is no way to know whether the sentencing judge would have issued the same sentence under advisory Guidelines.[162] The Seventh Circuit disagrees with the approach taken by the Eleventh Circuit, however, because the Eleventh Circuit's approach serves to "condemn some unknown fraction of criminal defendants to serve an illegal sentence."[163] Yet the Seventh Circuit also disagrees with the approach taken by the Fourth[164] and Sixth[165] Circuits because, according to the *Paladino* court, "[t]he equal and opposite error is to assume that every sentence imposed in violation of the Sixth Amendment and therefore of *Booker* is plainly erroneous and thus automatically entitles the defendant to be resentenced."[166]

The Seventh Circuit recognizes the distinction between a constitutional error and a non-constitutional error.[167] The court's analysis is the same, however, under either form of *Booker* error. Noting that there would be no prejudice to the defendant if the judge would impose the same sentence regardless of whether the Guidelines are advisory or mandatory,[168] the Seventh Circuit follows the Second Circuit's lead. This approach to the substantial rights prong of plain error analysis for *Booker* error is thus to remand the case to the District Court,[169] asking the sentencing judge if she would have given a different sentence under the Guidelines if the Guidelines were advisory rather than mandatory.[170] If the judge answers no, the court will affirm the original sentence as long as it is reasonable;[171] if the

162. *Id.* at 482.

163. *Id.* at 484.

164. *Id.* at 483 (citing United States v. Hughes, 396 F.3d 374, 380–81 (4th Cir. 2005)).

165. *Id.* (citing United States v. Oliver, 397 F.3d 369, 379 (6th Cir. 2005)).

166. *Id.*

167. *See, e.g.*, United States v. White, 406 F.3d 827, 834–35 (7th Cir. 2005).

168. *Paladino*, 401 F.3d at 483.

169. Although otherwise modeled after the approach taken by the Second Circuit in *United States v. Crosby*, the approach devised by the Seventh Circuit differs because the Seventh Circuit, unlike the Second, retains jurisdiction over the case throughout the limited remand. The court will vacate the sentence upon notification that the judge would have imposed a different sentence under advisory Guidelines, then remand to the district court for resentencing. *Id.* at 484.

170. *Id.* at 483–84.

171. The Supreme Court not only excised the provision of the Guidelines that made the Guidelines mandatory; the Court also excised the provision that set forth standards of review. The Court decided that a standard of reasonableness was appropriate in this case both because such a standard is "consistent with appellate sentencing practice during the last two decades," and, prior to 2003, the excised provision that set forth the standards of review "explicitly set forth" review for reasonableness. United States v. Booker, 125 S. Ct. 738, 765–66 (2005).

judge answers yes, the court "will vacate the original sentencing and remand for resentencing."[172]

Although the Seventh Circuit's approach is preferable to that of the Eleventh Circuit, this application of the substantial rights prong also fails to comport with the Supreme Court's opinion in *Booker*. The Seventh Circuit's application properly considers the defendant's constitutional rights and, to at least some extent, the importance of procedural safeguards; but it nonetheless fails because it improperly delegates responsibility to evaluate plain error to the district court.[173] Furthermore, the Seventh Circuit's approach does not provide an opportunity for the defendant to present additional mitigating evidence to the sentencing judge if, upon the limited remand, the sentencing judge declares that she would have given the same sentence under advisory Guidelines. In such a situation the defendant will not receive a new sentencing hearing because the Seventh Circuit will affirm the sentence as long as it is reasonable.[174] Thus, it is possible that even under the Seventh Circuit's approach of limited remand, the *Booker* error may cause a miscarriage of justice due to the fact that *Booker* altered the entire legal framework under which the defendant was originally sentenced. As demonstrated below, such an error can be corrected only by presuming prejudice.

C. *Sixth Circuit*

The Sixth Circuit, like the Eleventh Circuit, begins its inquiry into the proper substantial rights application by looking to *United States v. Olano*.[175] Unlike the *Rodriguez* court, however, the Sixth Circuit takes note of *Olano*'s two exceptions[176] to the general rule that the defendant must "demonstrate that the error 'affected the outcome of the district court proceedings.'"[177] The Court has found structural error only in cases in which a defendant has been "denied certain fundamental rights," such as the follow-

172. *Paladino*, 401 F.3d at 484.

173. "The *Crosby* solution [the solution adopted by the Seventh Circuit] turns the review process on its head. The determination of plain error is the duty of courts of appeal, not district courts." United States v. Rodriguez, 398 F.3d 1291, 1305 (11th Cir. 2005) (citing United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004)). *See also Paladino*, 401 F.3d at 487 (Ripple, J., dissenting) ("The panel decision today offers a superficially pragmatic, but not a principled, basis for adopting its novel approach to plain error analysis. Particularly troubling, in terms of its long-term impact, is the delegation to the district court of *our* judicial responsibility to evaluate plain error on an independent basis.") (emphasis in original).

174. *Paladino*, 401 F.3d at 484.

175. United States v. Barnett, 398 F.3d 516, 526 (6th Cir. 2005).

176. These exceptions are structural errors and errors that are presumed to be prejudicial. *See* United States v. Olano, 507 U.S. 725, 735 (1993).

177. *Barnett*, 398 F.3d at 526.

ing: the right to counsel; the right to an impartial judge; exclusion of jurors of defendant's race from grand jury; the right to a public trial; and erroneous reasonable doubt jury instructions.[178] *Booker* does not implicate any of these enumerated rights, so the *Barnett* court determined that this exception did not apply.[179] According to *Olano*, the other exception, a presumption of prejudice, is appropriate in situations where the defendant cannot make a specific showing.[180] Courts have presumed prejudice in numerous situations where "the inherent nature of the error made it exceptionally difficult for the defendant to demonstrate that the outcome . . . would have been different" but for the error.[181] Because this is precisely the situation in cases of *Booker* error, the Sixth Circuit held that a presumption of prejudice should apply in cases of pre-*Booker* sentencing.[182]

The Sixth Circuit recognizes two distinct forms of *Booker* error: error exists where the sentencing judge used extra-verdict enhancements, which according to *Booker* violates the Sixth Amendment;[183] and error also exists where, as in *Barnett*, the plain error is not a Sixth Amendment violation,[184] but rather that the sentencing court treated the Guidelines as mandatory rather than advisory.[185] Recognizing that either form of error creates the same difficulty for the defendant, the Sixth Circuit crafted its holding to apply to both forms; the court also explicitly specified that the presumption of prejudice is rebuttable.[186]

This rebuttable presumption is a crucial part of the *Barnett* court's holding because if the presumption were not rebuttable, the Sixth Circuit's application of the substantial rights prong would not conform to *Booker*'s caution that not all cases should be remanded for resentencing.[187] The re-

178. For a list of these cases, see *supra* note 86.

179. *See Barnett*, 398 F.3d at 526. After briefly discussing the exception made for structural errors, the *Barnett* court noted that "[t]he Supreme Court has found 'structural errors only in a very limited class of cases.'" *Id.* The court proceeded to analyze and adopt the second exception of presumed prejudice. *Id.* at 526–29.

180. *Id.* at 526 (citing Manning v. Huffman, 269 F.3d 720, 726 (6th Cir. 2001)).

181. *Id.* at 526–27. The *Barnett* court cited cases from the First, Third, Fourth, Fifth, and Sixth Circuits in which the court found it appropriate to presume prejudice when evaluating the substantial rights prong of plain error review. In each case, prejudice was presumed both because of the nature of the error and the difficulty the defendant would have in showing that the error was prejudicial. *Id.*

182. *Id.* at 527–28.

183. *See* United States v. Oliver, 397 F.3d 369, 378 (6th Cir. 2005).

184. Barnett claimed that his Sixth Amendment rights as defined by *Apprendi* were violated by the district court's application of the Armed Career Criminal Act, but the court of appeals ruled that there was no Sixth Amendment violation because "*Apprendi* does not require the nature or character of prior convictions to be determined by a jury." *Barnett*, 398 F.3d at 524.

185. *Id.* at 527.

186. *Id.* at 529.

187. *See* United States v. Booker, 125 S. Ct. 738, 769 (2005).

buttable presumption allows the Sixth Circuit to successfully balance the competing demands for judicial efficiency with a defendant's constitutional rights, because if the prosecution is able to demonstrate that the defendant was not prejudiced, there is no violation of the defendant's right to due process.

A presumption of prejudice is necessary in the application of substantial rights analysis for plain error review of either type of *Booker* error for two reasons: first, because of the difficulty (if not impossibility) of showing that the outcome would have been different but for the error; and second, because "[u]nder the new post-*Booker* framework, counsel are now able to present aggravating and mitigating circumstances 'that existed at the time [of pre-*Booker* sentencing] but were not available for consideration under the mandatory Guidelines regime.'"[188]

As both the Eleventh and Seventh Circuits recognize, there is no way to know what sentence the sentencing judge would have imposed if she had known that the Guidelines were advisory rather than mandatory. Following its peculiar interpretation of the Supreme Court's plain error jurisprudence, the Eleventh Circuit concluded, "[I]f the effect of the error is uncertain so that we do not know which, if either, side it helped the defendant loses."[189] The Seventh Circuit rejected this position and concluded that in such a situation, it is necessary to issue a limited remand in order to inquire of the sentencing judge whether she would have imposed a lesser sentence under advisory Guidelines. Yet neither approach considers the important fact that the defendant convicted and sentenced prior to *Booker* was effectively denied the opportunity to present mitigating evidence to the sentencing judge because such evidence was irrelevant under the then-mandatory Guidelines.

> In sum, because the entire legal framework in which [the defendant's] sentencing occurred was flawed, there is no way for him to prove, and for [the court of appeals] to accurately assess, the likelihood that the district court would have imposed a different sentence had it known it had the discretion to do so. In other words, "it would be exceedingly difficult for the [defendant] to show that his sentence would have been different if the district court had sentenced him under [an] advisory, rather than the mandatory, Guidelines framework."[190]

These considerations make it clear that direct review of *Booker* error requires federal appellate courts to utilize the presumed prejudice exception to the substantial rights prong provided by the Supreme Court in *Olano*. In

188. *Barnett*, 398 F.3d at 528 (citing United States v. Crosby, 397 F.3d 103, 118 (2d Cir. 2005)).

189. United States v. Rodriguez, 398 F.3d 1300 (11th Cir. 2005).

190. *Gonzalez-Huerta*, 403 F.3d 727, 752 (10th Cir. 2005) (Briscoe, J., concurring in part and dissenting in part) (quoting *Barnett*, 398 F.3d at 528).

Olano, the Court declared that there was no need to decide when prejudice should be presumed. In the wake of *Booker*, that need has arrived.

CONCLUSION

To resolve the current intercircuit split regarding the proper application of the substantial rights prong of plain error review, the Supreme Court should adopt the reasoning of the Sixth Circuit in *United States v. Barnett* and *United States v. Oliver*. A presumption of prejudice is appropriate for review of both constitutional and non-constitutional *Booker* error not only because of the impossibility of proving adverse effect, but also because any other approach will undermine the credibility of the criminal justice system. Regardless of whether the perceived error is classified as constitutional or non-constitutional, a defendant sentenced under the pre-*Booker* Guidelines would not have had any reason to present evidence that might have influenced the sentencing judge to impose a different sentence from that mandated by the Guidelines.

An automatic denial of remand, which is the result of the approach taken by the First, Fifth, Eighth, Tenth, and Eleventh Circuits, will harm the system as a whole. Defendants convicted under the mandatory Guidelines and awaiting appeal will not understand the technicalities of the rule; they will legitimately feel that they have been denied due process and the American guarantee of justice for all. Conversely, automatic partial remand, the result of the Second, Seventh, Ninth, and D.C. Circuits' approach, is an unwieldy solution that is contrary to the Court's opinion in *Booker*. The approach taken by the Third, Fourth, and Sixth Circuits, with a presumption of prejudice, is the only approach to properly consider both the Court's opinion in *Booker* and the Court's prior plain error jurisprudence. Of these circuits, however, the Sixth Circuit's approach is the only one that properly considers both the Supreme Court's directive that not all cases involving *Booker* errors should be remanded and the important concern for procedural due process that is necessary for the continued credibility of our judicial system. Accordingly, the Supreme Court should adopt the reasoning exemplified by the Sixth Circuit's opinion in *Barnett* and take the next opportunity to clarify that a rebuttable presumption of prejudice is appropriate in plain error review of *Booker* error.